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No. 1050

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In The Supreme Court of The United States

OCTOBER TERM, 1966

RICHARD S. HENDERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered on May 13, 1966 in which a motion to vacate judgment and enter a different judgment was denied on October 14, 1966 in the case of Richard S. Henderson, plaintiff, v. The United States of America, defendant, cause number 171-61.

CITATIONS

The opinion of the Court of Claims has not yet been reported. It will be reported in the Federal Reporter. That decision, because of its length, has not been printed in an appendix to this petition. However, a certified copy thereof is filed with the clerk of the Supreme Court.

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1255.

QUESTIONS PRESENTED

1. Do the protections of the Bill of Rights which relate to due process of law, confrontation of witnesses, the right to counsel, the right to cross-examine and the right to a duly constituted tribunal apply in military administrative proceedings?

2. Does the presence of a non-voting recorder, during the executive or closed session deliberations of a military administrative board, violate the requirement of a full and fair hearing, or the rights of cross-examination or confrontation, when that same recorder had acted as a prosecutor against petitioner before that board?

3. Does the lack of a quorum, as defined in the appropriate military regulations, deprive a military administrative tribunal of jurisdiction and therefore render the proceedings void?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The constitutional provisions involved are Amendments Five and Six. The administrative regulations involved are primarily Air Force Regulation 53-15 dated May 15, 1956 and Air Force Regulation 11-1. The pertinent parts of those regulations appear in the opinion of the Court of Claims.

STATEMENT OF THE FACTS

Petitioner, an officer in the Air National Guard, was called to active duty for training for a period of one year or more for the purpose of undergoing jet pilot training in grade.

He reported to Graham Air Base, Florida, on March 20, 1955.

Petitioner failed to obtain a satisfactory rating on a progress check ride and was therefore notified to appear before a faculty board whose purpose was to determine whether or not petitioner should be eliminated from flying training because of flying deficiency.

Petitioner appeared before a faculty board at Graham Air Base, Florida. That board recommended that petitioner be eliminated from pilot training but that he be considered for further air crew training.

Petitioner, after various administrative requirements were satisfied, i.e., resigning his commission in the District of Columbia Air National Guard and obtaining a commission in the Virginia Air National Guard

again entered upon active duty for training for a period of one year or more in September, 1955 for the purpose of obtaining the aeronautical rating of aircraft observer at Ellington Air Force Base, Texas.

During the course of his aircraft observer training, petitioner was found to be deficient in certain academics and was required to repeat the subject matter concerned. He was therefore "washed back" to a subsequent class.

When the class to which petitioner was "washed back" repeated certain air work that petitioner had satisfactorily completed in his previous class, after re-testing, petitioner was now found to be unsatisfactory in the same work; but he was satisfactory in academics.

Petitioner was then ordered to appear before a faculty board to determine whether or not he should be eliminated from observer training because of flying deficiency.

That faculty board, which shall be called henceforth the Ellington Board, was found as a fact by the Trial Commissioner in the Court of Claims to have been composed of less than one-half of those appointed to that board. Therefore, by the terms of the appropriate regulations, AFR 11-1, it lacked a quorum.

The recorder, a non-voting member of the board who was junior in rank to petitioner, caused various documents to be introduced into evidence against the petitioner and acted, in general, in the nature of a prosecuting attorney.

That recorder, as found as a fact by the Trial

Commissioner, remained with the voting members of the board during its executive session while the board deliberated petitioner's fate. Petitioner was excluded from the executive session.

The evidence presented against petitioner at the Ellington Board was constituted solely of various written reports, which were hearsay, and the oral testimony of one Captain Konieczka.

Captain Konieczka testified in effect, that he had never flown with petitioner; that the petitioner had too many absenteeisms; that in flying, the stress is for accuracy and that petitioner's accuracy was acceptable; but in getting accuracy petitioner did not follow the proper procedures; and further that petitioner had sufficient ability to do the necessary work.

The Ellington Board recommended that petitioner be eliminated from observer training.

The review procedure required by the appropriate Air Force regulation was never complied with prior to final action and petitioner was "washed out" from observer training; and, as a matter of course, relieved from active duty for training.

Petitioner then petitioned the Air Force Board for the Correction of Military Records to correct his record with regard to both the Graham and Ellington Faculty Boards.

Petitioner complained, among other things, that the failure of either board to have a quorum, the presence of the non-voting recorder during executive session,

the failure to allow confrontation and cross-examination of witnesses, the failure to provide effective appellate review prior to final action; and, the basing of the board's decision solely upon hearsay evidence offended not only the various regulations concerned, but due process of law as understood by the United States Constitution.

The Air Force Board for the Correction of Military Records summarily rejected each of petitioner's contentions. It ruled that the faculty boards concerned were conducted in:

> "Substantial compliance with the applicable regulations and there were no errors of procedure so prejudicial as to justify voiding the proceedings."

Petitioner then brought suit in the Court of Claims.

All of petitioner's contentions were rejected in that court except that it was conceded that the Graham Board did not meet the quorum requirements of the applicable regulation.

Because of the lack of a quorum, the Graham proceedings were found to be invalid because the board was without jurisdiction; and, its proceedings were therefore void ab initio. Petitioner therefore was granted relief in the Court of Claims as to the Graham proceedings.

However, the decision in the Court of Claims sidestepped the effect of its Finding of Fact that the Ellington Board had no quorum.

The same regulation applied to both boards ---

AFR 11-1. Logically if lack of a quorum invalidated the Graham Board, lack of a quorum invalidates the Ellington Board.

The Ellington Board's proceedings were upheld on the grounds that petitioner's claims of error, even if true, were of such a technical nature that the errors should be disregarded since petitioner failed to show substantial prejudice.

REASONS FOR GRANTING THE WRIT

1. As yet, there is no decision of this Court that clearly states that the fundamental rights of confrontation, cross-examination, a duly constituted tribunal and all other procedural guarantees of the Constitution apply to military administrative tribunals.

This court has held that these fundamental constitutional rights are the essentials of due process, see Powell v. Alabama, 287 U.S. 45, and that such rights apply to courts martial, see Clackum v. United States, 296 F.2d 226.

In Greene v. McElroy, 360 U.S. 474; Vitarelli v. Seaton, 359 U.S. 535; and Willner v. Committee on Character and Fitness, 373 U.S. 96, this Court applied Fifth Amendment concepts of due process and Sixth Amendment concepts as to cross-examination and confrontation of witnesses to civilian administrative proceedings.

2. This court should grant certiorari in this matter to show that the ruling in Vitarelli v. Seaton, 359 U.S. 535, applies as fully to military administrative

proceedings as it does to civilian administrative proceedings. In Vitarelli, this court held that "scrupulous" observance of procedural safeguards rather than "substantial" compliance with procedural safeguards is required in civilian administrative proceedings.

3. The Court of Claims held that petitioner's rights were not violated, since the Ellington Board was:

> "Conducted in substantial compliance with applicable regulations, directives and statutory law. . . any defects. . . related to procedural matters and were of such a technical nature that they may be disregarded."

Zenith International Film Corp. v. City of Chicago, 291 F.2d 785 at 788 held:

> "The essence of justice is largely procedural."

The District Court of Appeal of the State of California has recently held in People v. Rodriquez, 242 ACA 875, 51 Cal. Rptr. 873 (1966) in effect, that members of the Armed Forces are not second class citizens whose constitutional rights may be trampled on. Should the Supreme Court of the United States think less of those rights?

4. The Court of Claims approved, by implication, the practice of allowing non-voting members of administrative boards to be present during closed session deliberations. It also appears to hold that the mere presence of this non-voting recorder during executive session could not be held to be improper absent an affirmative showing of prejudice, in spite of the fact that he

introduced evidence into the record against petitioner.

It is not an ironclad rule that specific prejudice must always be shown where constitutionally protected rights could be violated. Estes v. Texas, 381 U.S. 532.

In a way, to allow a person who has furnished evidence against the respondent before that board to accompany an administrative tribunal into executive or closed session makes this case like Turner v. Louisiana, 379 U.S. 466 and Parker v. Gladden, No. 81, October term, 1966, which denounced as violative of the right to confrontation and cross-examination the placing with the jury as a bailiff one who had testified against the defendant or allowing the bailiff to communicate with the jury. How can a prosecutor be with the jury during its deliberation without offending these same constitutional rights?

In Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260, the Court of Appeals for the District of Columbia Circuit applied the standards promulgated in In Re Murchison, 349 U.S. 460-464, a criminal case, to a fundamentally administrative action. Holding:

> "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. . .
>
> An administrative hearing. . . must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process."

5. The opinion of the Commissioner, adopted by the Court of Claims, makes the gratuitous comment that petitioner's claim is without merit, in that petitioner does not claim that he met the academic and professional standards for retention in observer training. That is not correct and is contrary to the evidence.

The only witness before the board who was subjected to cross-examination testified that petitioner's accuracy was acceptable; and that petitioner had the ability to do the necessary work.

However, this appeal is based upon the law, and not upon the facts.

6. This Court should grant certiorari not merely because this petitioner's procedural rights were denied to his detriment, but because petitioner's case is illustrative of perhaps thousands of men in the Armed Forces who have been and will be summoned before administrative proceedings.

Since 1947, this nation has been at war, sometimes hot and sometimes cold, with a dynamic but undemocratic communist ideology, which has exposed its jurisprudence to the world in the Gary Powers case. Because of this tense world situation, unprecedented numbers of Americans have become involved with the Armed Forces -- either as draftees or volunteers. Thus for the first time in American history, our young men have been and will be subject to military law under quasi-peacetime conditions. Petitioner's case is but one example.

Had petitioner been court martialed, the procedures would have been well-defined and subjected to scrupulous

appellate review. Why should the mere fact that petitioner's rights were disregarded by an administrative tribunal, rather than by a courts martial, render his constitutional protections any less effective.

The inevitable conclusion is that constitutionally guaranteed procedural rights should exist in administrative as well as judicial settings of military proceedings. In summary, the problem involved is not academic or episodic. It is real, important, and timely for thousands of Americans.

CONCLUSION

From the foregoing statement of the case and reasons presented, this petition for certiorari should be granted.

Dated: February 9, 1967

Respectfully submitted,

/s/ RICHARD S. HENDERSON
Pro se.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1050

RICHARD S. HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1956, petitioner, who was then an officer in the Virginia Air National Guard, was eliminated from the United States Air Force aircraft observer (aircrew) training program at Ellington Air Force Base by a faculty board on grounds of flying deficiency.[1]

[1] In 1955, while petitioner was an officer in the District of Columbia Air National Guard, he was eliminated from the Air Force pilot training program at Graham Air Force Base, also on grounds of flying deficiency. In the proceedings below, the Court of Claims found that the Graham faculty board

That action did not affect petitioner's commission as an officer, nor his membership in the National Guard.

Petitioner was present at the proceedings before the Ellington faculty board and stated that he had no objection to the Letter Order appointing the board and did not wish to challenge any member for cause. Petitioner testified in his own behalf and cross-examined his flight commander, who had recommended his elimination from the school. Petitioner did not challenge the faculty board's procedures until more than two years later. In 1958 he filed an application with the Air Force Board for Correction of Military Records seeking reinstatement in flight training, promotion and back pay. Petitioner did not claim that he was qualified to continue the aircraft observer course, or that, had he been permitted to continue, he would have graduated with an aircraft observer aeronautical rating. He claimed only that the faculty board proceedings which resulted in his elimination from the course were a nullity because of certain procedural irregularities. The Correction Board denied the application.

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was not constituted in conformity with the relevant Air Force regulation (AFR 11-1, para. 4) in that one of the board's voting members was junior in rank to petitioner. The Court of Claims held that this defect deprived the board of jurisdiction and that petitioner was entitled to recover accrued pay, including flying pay and allowances, from May 4, 1955, when he was eliminated from the pilot training program, until September 5, 1955, when he entered on active duty for training at Ellington Air Force Base. The petition is limited to an attack on the decision below insofar as it sustains the propriety of petitioner's elimination from the Ellington training program.

Petitioner then brought this action in the Court of Claims, which held that petitioner's claim with respect to the proceedings before the Ellington Board is "without merit" (Slip Op. p. 27). In particular, the Court of Claims found "that the Board was properly constituted; that its findings were more than adequately substantiated by acceptable evidence; that the recommendations were proper, reasonable and fully justified; that the Board proceedings were conducted in substantial compliance with applicable regulations, directives, and statutory law; that none of [petitioner's] rights were substantially prejudiced; and that the action of the Air Force Board for Correction of Military Records in denying [petitioner's] request for correction of his records relating to the Ellington Board proceedings was not arbitrary or capricious" *(ibid.)*.

1. Assuming that the requirements of due process are applicable to the proceedings of an administrative faculty board charged solely with determining whether a student is qualified to continue in a special military course, it is clear here that the petitioner was not denied due process. He had notice of the proceedings and was permitted to appear on his own behalf; he had the right to challenge the members of the board for cause, to introduce evidence and to confront and cross-examine witnesses against him.

2. Petitioner urges (Pet. 8-9) that the presence of the two non-voting members of the board during the board's closed deliberations was violative of his rights. There is, however, no warrant for his contention that either of the non-voting members had the function of

a prosecutor. Furthermore, as the Court of Claims noted (Slip Op. p. 15-16), petitioner "has made no showing that the presence of the recorder and reporter during the closed session of the Ellington Board proceedings violated the provisions of any regulations, directives, or statutes applicable to a faculty board hearing such as the one involved herein, or that their presence was improper or prejudicial to [petitioner's] rights in any manner."

3. Petitioner also urges (Pet. 6-7) that the Ellington Board's proceedings were defective for want of a quorum. There is no basis for this contention. Paragraph 4 of AFR 11-1 required the presence of at least three eligible voting members in those cases in which the appointing order was silent as to the number of members an administrative board was to have. Here, while the appointing order listed eleven officers eligible to vote (and three non-voting officers), it did not designate the number of officers who were to sit on any given faculty board. Since petitioner's board was composed of five eligible voting members, it clearly met the quorum requirement of AFR 11-1. More important, the composition of the board was clearly consistent with the specific regulation governing the procedures of the aircraft observer school faculty board (FTAF Man. 51-4, Oct. 1955, para. 7) which also prescribed a quorum of three voting members.

4. Finally petitioner waived his right to challenge the faculty board's procedures by his failure to object to them at a time when the alleged irregularities might have been cured. More than two years elapsed

between the completion of the board's proceedings and the time petitioner first protested the administrative procedures. In the circumstances, the protest came too late.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1967.

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